

**Secretary Scott Hassett  
Wisconsin Department of Natural Resources  
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I would like to thank Alan Freed and the program committee for this opportunity to speak on the Department of Natural Resources in the Doyle Administration.

As you know, I was a practicing lawyer who was appointed to bring fresh eyes to the DNR. I have listened to hundreds of employees and thousands of citizens, traveling the state on 107 days since coming to DNR.

My conversations inside DNR have convinced me that our employees are deeply dedicated to environmental protection and want to do their best, even as they suffer cuts of funds and positions. External conversations also are inspiring. Citizens feel deeply about natural resources and want to protect them, even as they fear for their jobs. They also want to be more involved in protecting the environment and contributing to the conservation ethic as partners with DNR.

These compelling and complementary conclusions have convinced me that it is time to change how Wisconsin protects its environmental legacy within law and to modernize the role the DNR plays in that imperative.

My topic today is "The New DNR and Phase Two of Environmental Law."

The word is out that DNR is positioned for change. The change is characterized in different ways, but I describe it as a change in culture and practice, within law.

Here in the United States, environmental law is grounded in what is called "adversarial legalism." This approach affects how government relates to business and how regulators define their jobs. Adversarial legalism and its regulatory structure come from the era of the New Deal.

Generations later, there is a growing consensus among legal scholars that new approaches to law, law-making, lawyering and governance are necessary for the protection of public goods, including the environment. The pressure for change is especially intense because so much environmental law governs manufacturing.

Wisconsin has lost 85,000 manufacturing jobs in the last 5 years. And even though environmental regulations are only one factor in competitiveness, the DNR and regulations are in the bull's-eye.

I call the laws we have on the books Phase One. This is the law of command and control and I have heard stories about its successes and shortcomings. As a result, I have opinions about improving upon the "adversarial legalism" of Phase One and developing a Phase Two which -- at least for now -- I will call "aspirational legalism."

In his book "Adversarial Legalism, the American Way of Law," Robert Kagan from UC-Berkeley describes a legal system that looks rational, is attentive to economic and environmental values, and is well grounded in democratic opinion. It looks rational if we view each law independently, while ignoring other laws, societal priorities and competing rights. Professor Kagan says, however, that a broader view shows a system that is irrational, unjust and lamentably inefficient.

I am not as harsh on Phase One and recognize its accomplishments. I remember when the Wisconsin River was a blend of colors from uncontrolled discharges. If you dared to fish you could not eat what you caught. Air quality was no better but the local citizens said it "smelled like money." Without a doubt, today's water and air are cleaner.

But Phase One was based on another time. It was a time when manufacturers in Wisconsin and the United States dominated the world. Phase One was created to confront those industries and curb their pollution. The workers and the public wanted pollution stopped and Phase One took on the job. And it should be abundantly clear that the state will enforce the standards that produced those gains. Strong enforcement is needed not only because it is the right thing to do, it is the fair thing to do for those businesses that are in compliance with the law.

But, as they say, "that was then, and now is now."

In his book "The Cultural Study of Law," Yale's Paul Kahn quotes Thomas Jefferson on the dangers of lapsing into an attitude that law is permanent. Jefferson advised America to update, renew and rewrite law as generations passed. He said that legal revolution is the obligation of each generation. To fail that obligation is to fail the political and moral responsibility of self-government.

### **The case for Phase Two**

The business case for Phase Two is familiar to you who represent manufacturers. There is concern in Wisconsin's manufacturing sector. To remain competitive, there is an aggressive search for productivity and flexibility throughout the system.

The government case for Phase Two is familiar to me as Secretary. DNR is in constant downsizing. Functions are being dropped. There are 69 fewer environmental regulators in

DNR today than 10 years ago. That's a 7.5% loss. Last week we just announced an \$1 million cut in our air program.

The environmental case for Phase Two is also known. Unmet needs range from non-point source pollution to climate change. Cities must rebuild to combat sprawl. Rural soil and water protection has to align with profitable farming. Phase One cannot meet these needs.

In different ways, we all face the same challenge.

The business community is not asking for lower environmental standards. But it wants laws and practices that do not put jobs at risk. It wants permits quickly and the flexibility to change processes overnight.

Political leaders are equally direct with state agencies: Do less with less. The challenge is to set smart priorities that protect our gains while addressing the environmental work that remains. The legal profession has to help its clients and agencies accept change and offer its insights in the interest of good government and competitiveness.

## **The content of Phase Two**

Before discussing Phase Two, I'd like to say two words about Phase One. The first is that it should remain. The second is that it must get more efficient.

There must always be a Phase One for those that want it or need it. Like an old shoe, some businesses may simply be more comfortable with Phase One. In any case, Phase One must be credible. The standards will remain and DNR will enforce them.

We also know that Phase One can be more efficient. This is what permit streamlining is about. I invite the legal profession to work with me through my Innovation Stakeholders Group to prune the branches of Phase One to help maintain its credibility while not backing off one bit on standards.

Another reason to keep Phase One is that laggards won't qualify for Phase Two. Phase Two should provide flexibility for businesses that earn it. This is what Governor Doyle envisions in his Grow Wisconsin proposal for good actors in Phase Two. Firms could sign enhanced cooperative agreements with DNR that could extend over longer periods of time and respond to business needs.

Phase Two also could provide branding and good governance value for those that want it. These two aspects of Phase Two may have special value for firms that compete globally, must comply with industry codes of conduct, must meet investor governance criteria or be credible with bodies like the European Union.

Phase Two will be based on environmental performance. Simply put, businesses will have the flexibility to pursue goals that they set with DNR and the community. The legal tools will be contracts that are for the length of a permit or longer. The terms and

conditions will depend upon the needs of the business and the reach of environmental goals. Crafting contract language for a new "we can" approach to greater environmental performance is going to be exciting and historic. Regulatory reform is not about what we do to each other. It is about what we will do together.

Change will require DNR to think differently. We will not only think about the compliance minimum - the adversarial way - but about the potential for environmental greatness, the aspirational way.

One way to move into that new way of thinking is to think about "regulatory bubbles." To illustrate a bubble, someone suggested imagining a huge bell jar "a bubble" placed over an entire facility such as a manufacturing plant. Rather than setting regulatory limits for each smokestack, discharge point or process, the regulator sets a single, plant-wide limit for the pollution occurring throughout the bell jar. This approach allows the regulated party to control emissions less stringently from some emission points as long as it makes up for the shortfall by controlling others more stringently.

My goal is to control pollution more efficiently and also move into the realm of superior environmental performance. Bubbles are like environmental enterprise zones that unleash our capacity to pursue superior environmental goals we could only dream of in the past.

In an article entitled "Toward Bigger Bubbles," former EPA General Counsel Don Elliott and director of the Federal Risk Assessment Commission Gail Charnley list ways that bubbles provide greater protection at lower cost. First and foremost, they say bubbles allow the regulatory system to bring more risks under its control.

Another advantage is that they provide a legal and convenient way to surmount the boundaries that inhibit program coordination. And finally, they point out that bubbles can cover geographic expanse, extended periods of time, multiple pollutants, multiple risks and overlapping jurisdictions.

In Milwaukee, for example, when we look at the Menomonee Valley, we should not see contaminated soil. We should envision a bubble over an environmentally sustainable valley that uses all of the regulatory flexibility, technical assistance and grant assistance available to DNR and all other state agencies to create a vibrant ecological neighborhood.

In northeast Wisconsin, in a project called Dairy Gateway we should not see disconnected farms to regulate. We should envision farming neighborhoods where farms and homes are covered by a legal, ecological umbrella that brings them together as parts of an interdependent system in harmony with land and water.

Bubbles also can be done quite simply for manufacturers and others. They can be over a facility; multiple facilities; one process or multiple processes; a watershed, one product or an entire value chain. The goal is to achieve superior environmental performance and the way to achieve it is through creative flexibility.

I want to be, and WILL be, the Secretary who encourages creativity, whether it is through permit streamlining, rule flexibility or provisions like those in Grow Wisconsin, Green Tier or the Environmental Results Act.

One of my main tasks is to remove the traditional blinders that discourage us from delivering a system that produces greater environmental results. I encourage you to help me in this task while serving your clients.

Phase Two and bubbles have been pilot tested with encouraging results. The test is a law called the Environmental Cooperation Pilot Program. The results have come from seven pilot projects with 3M, Cook Composites, Packaging Corporation of America, Madison Gas and Electric, We-Energies and Northern Engraving. These firms are producing impressive results that benefit them and the environment.

We are also learning lessons about how regulatory flexibility can re-energize community interest in the environment and channel it to beyond-compliance results.

### **DNR Employees in Phase Two**

The legal instruments used in Phase Two are new to many DNR employees. They include contracts, charters, memoranda of understanding, environmental management systems and general permits among others. The employee skills in Phase Two involve collaboration, brokering, leveraging, mutual-gain negotiation and performance management. These are not Phase One skills.

The shift to a performance system where everyone can be better off requires changes in how DNR employees and businesses relate to each other. In some cases, bridges must be built over wide and historic gaps. Lawyers have the skills to build those bridges. I assure you that if you begin building from your side, I will begin from my side.

This brings me to culture change. Culture change is important for improvement of Phase One. But it is critical for the launch of Phase Two. Over the months, I have listened to many persons who have helped me understand the DNR's culture and helped me set my leadership agenda.

DNR's culture will be guided by four words that begin with "A." They are: Awareness, Attitude, Action and Accountability. These words will be shorthand for the relationships that we need to be effective. In the end, I want DNR norms and culture to internalize the dual objective of having respectful relationships with citizens and producing measurable environmental results.

I will explain the "Four A's" and how they will affect the DNR.

The first "A" is for Awareness. The New DNR will be aware of the world outside its walls and relate to the people who live in that world, including those in the regulated

community. It basically means that we will walk in others' shoes - including businesses -- and understand the pressures they face.

The second "A" is for attitude. The New DNR will be known for its respect of others not its attitude toward others. I support the vast majority of employees who deal with citizens in a respectful, helpful and courteous fashion.

But as with any organization, there will be times when employees are unprofessional. These negative examples are what people remember. I will hold DNR employees accountable to a high standard of business-like behavior. But I also want to stress that I expect respect for DNR employees from businesses as well.

The third "A" is for Action. The New DNR will be measured by results not paperwork. We will let go of tasks where we can by setting priorities that align with the reality of fewer employees. Our policies and practices will differentiate between regulated entities that have strong compliance records and those that don't.

For example, I am working with a multiple state consortium to develop compliance information in a way that will drive work priorities and identify good actors for the programs that the Governor wants.

Another form of "action" is policy innovation. In his campaign, Jim Doyle called for fresh ideas to protect the environment. My message to employees, citizens and businesses is that I want to hear innovative ideas.

I am heeding a message from Professor Bob Behn from the Governor's Center at Duke University. He said that for a growing state agency innovation is desirable; but for a shrinking agency "innovation is essential for survival." To survive, DNR must do old tasks differently and replace some old tasks with new ones that deliver greater environmental value.

Action also means meaningful environmental permit reform. New Source Review reform will be done in seven months. Comprehensive Air Permit streamlining will be in place next year. I have signed a cooperative agreement with the Public Service Commission to change the way the DNR and PSC relate to each other on utility projects.

Whether set by the Governor or Legislature, permit application processing goals will be met. The permit problem did not start in the Doyle Administration but we will solve it.

The Department is doing a lot on its own and we should give ourselves some credit. For example, I am proud of the record we have in the Water Program on permit turnaround times. The Department is one of the top agencies in the nation for WPDES permit processing. Within the next year that program will take the major step of consolidating three grading permits into one, making it easier for agency staff, landowners and builders that want to move earth near state waterways. This was mentioned in the Governor's

Grow Wisconsin initiative and we hope to have it in place by this time next year. You can expect results in other programs as well.

The fourth "A" is for Accountability. The New DNR will be accountable to its mission and the public. To be credible, we need an effective accountability system. This is especially true on two issues of importance to the Governor: energy project review and regulatory reform, which DNR will publicly track on its web site.

### **The Legal Profession in Phase Two**

The changes that I mentioned have focused on DNR. But what about the businesses we regulate and their lawyers? The DNR wants to understand businesses' needs. But what about business understanding DNR's needs? If the DNR and business are to negotiate mutually beneficial contracts, lawyers that serve businesses need to look at things differently, too.

Fortunately, my Innovation Stakeholders Group is tackling culture change as well. The group includes business, environmental, academic, local government and agency participants. There are about a dozen attorneys that participate.

I am enthused about the role this group can play in helping DNR through change and impressed that they want to tackle how business behaves and relates to us as well. The Stakeholders Group and the Small Business Advisory Council have encouraged me to continue pushing for Phase Two. They have been a special help on the use of new legal tools such as flexible performance agreements, which are common in Europe.

People like Professor Don Kettl at UW's LaFollette School who know Europe's system have been of great help. They remind me that a more flexible regulatory structure need not be a rush to the bottom. In fact, a 1999 international report concluded that the United States ranked 13th of the 17 developed democracies in reducing air pollution, water pollution, solid waste and pesticide use. The leaders were Germany and The Netherlands.

In the United States, contract law is a familiar business tool, but not on environmental matters. So we must work together to develop the protocols and skills necessary for Phase Two negotiated agreements. I invite the State Bar to sponsor workshops on these issues. DNR would be pleased to help.

We all know that Phase One will continue to require your services. But I also believe there are professional opportunities in Phase Two. I invite you to join me in exploring those opportunities to our mutual benefit.

I also would like to open the door to informal discussions. I always welcome advice and appreciate creative discussion among professionals. So I invite you to think about informal settings to engage with me in "New DNR" discussions. Ethical ground rules should be in place. But those rules should not discourage us from brainstorming.

## **The Public in Phase Two**

As I mentioned, our citizens have a strong conservation ethic. They have been instrumental in bringing us to where we are today through their strong support of the law and the agencies that administer them. Over time, natural resources professionals assumed much of the work of protecting the public trust. We will continue to perform our duties.

At the same time, we know that we cannot do it all and need help. There are numerous examples of how citizens can help us. They include Friends of State Parks, local land trusts and volunteer water quality monitoring by citizens.

There are thousands of Wisconsin citizens are giving an incredible amount of time and energy toward conservation and environmental protection. I am convinced there are thousands more than want to join them if given the chance. In Phase Two, the Department will be looking for ways that the public can become more involved in protecting the commons. There are obstacles but we must overcome them. I will be speaking more to this issue in the future.

## **Conclusion**

Legal scholars around the world are discussing Phase Two environmental law and even here in Wisconsin, which can be a leader, if we choose. Earlier this month, the Center for World Affairs and Global Economy at UW-Madison sponsored a workshop on "Regulation, Governance and Law in the 21st Century: Towards a New Legal Process?"

David and Louise Trubek of the UW Law School performed a great service by calling this conference and asked several questions. Among them are:

- Has a governance approach emerged that replaces classic ideas of regulation?
- Does such a governance paradigm pose serious challenges for legal theory and require changes in lawyers' practices?
- Can we see similar developments in other countries?
- Must we rethink the distinction between rules and standards?

With their global experience and scholarship, the Trubeks tipped their hand by selecting the presenters who said that new legal processes are, in fact, emerging.

From the University of Columbia Law School, William Simon observed that legal liberalism that is often managed centrally by experts is yielding to a diffused and collaborative legal pragmatism. It is a shift, he said, from individualistic and categorical rights to common problem solving. Environmentally, that might be characterized by legal arguments that shift from a focus on parts per billion to ecosystem management.

From Harvard's JFK School, Orly Lobel said that new governance models of social conduct are replacing historic regulatory governing. She had examples affecting



employment, social services, health, education, policing, intellectual property, corporate shareholder protection and environmental protection. One of her contrasts was between what she called coercive law affecting discrete actions and aspirational law that produces holistic actions.

These snapshots are not to suggest the old way should be discarded or that new ways are perfect or even better. They do suggest that we must open our eyes to change and open our minds to changing. Wisconsin's competitive climate and environmental needs make these discussions real, not academic.

And as these discussions take place, as they have taken place in drafting the Good Actor language and similar ideas, we must be mindful of the economic and environmental link that has always been before our policy makers.

Indeed, jobs and environment have been linked throughout our political history and in that history are lessons. More than a century ago the Northern Forests were clear-cut. Public policy helped bring them back to deliver economic, environmental and aesthetic value. More than a generation ago, Governor Warren Knowles and the Legislature used innovative business tax policies to clean our industrial rivers and protect industry jobs.

Wisconsin officials of past generations enacted bold policies to secure the economic and environmental rights of those who followed. Much of the natural resources base that has defined us over time - waters, land and trees ' continue to define us and sustain us through economic engines like Tourism, Agriculture and Forest Products. Now it is our turn for bold policies to protect that base and keep the engines running.

In "The Cultural Study of Law," Kahn said that law is a way of "understanding the unity of community through time." Wisconsin's laws have often captured the unity of our community and its desire for a clean environment and thriving economy. This remains our challenge and my obligation.

It is DNR legend that conservation wardens would get midnight calls from mill workers who would report suspected spills before they happened. Now mill workers fear for their jobs and their leaders say that DNR needs to help in a different way. We need to care about their jobs and help them secure their future.

These workers do not want the standards to be lower. They want government to care about them and modern law to adapt to their needs. This is what I aspire to in the "New DNR and Phase Two of Environmental Law."

Thank you.